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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 173

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Brief for Plaintiff in Error

This case comes before the court on writ of error to the Circuit Court of the United States for the District of Rhode Island, the jurisdiction of the Circuit Court being in issue and the jurisdictional question alone being certified to this court under the provision of the Act of Congress, March 3, 1891, c. 517 § 5, 26 Stat. 827.

STATEMENT.

This action was brought on a bond given by Joseph J. Churchyard, a government contractor, to the United States of America, under the Act of Congress of August

13, 1894, Chapter 280, § 1; 28 Stat. 278.* One of the conditions of the bond was that the obligor, said Churchyard, should promptly make payment to all persons supplying him labor or materials in the prosecution of the work provided for in his contract with the government. James S. Kenyon, the party for whose use this suit was brought in the name of the United States of America, a lumber dealer in the City of Providence, sold lumber to Churchyard to be used in government contracts. Not having received payment for the lumber delivered to be used under one contract, suit was brought on Churchyard's bond. The defendant in the court below (plaintiff in error in this court), The United States Fidelity and Guaranty Company, surety on Churchyard's bond, moved in the Circuit Court that the action be dismissed for want of jurisdiction, on the ground that the amount involved, exclusive of interest and costs, was less than $2,000. This motion was

*Act Aug. 13, 1894, c. 280.

An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works. (28 Stat. 278.)

Bonds of contractors for public buildings or works.

Be it enacted, &c., That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such con.

denied and judgment was subsequently entered against the surety company on the bond; to which ruling of the court and entry of judgment the surety company duly excepted. Thereafter the action was brought to this court on writ of error.

CERTIFICATE OF JURISDICTIONAL QUESTION.

The jurisdictional question raised in this case, as shown by the certificate of the trial judge (Record p. 9), is as follows:

Does the Circuit Court of the United States have jurisdiction to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings or work, upon a certified

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tract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecutions shall involve the United States in no expense.

Security for costs in actions on bonds.

Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant.

copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Section 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works," wherein the amount involved is less than two thousand dollars ($2000.)?

POINTS OF LAW.

I.

The amount involved in this case being less than $2,000 the jurisdiction of the Circuit Court must fail unless the Act creating the Right confers jurisdiction or unless this is a controversy in which the United States is Plaintiff, all other Federal jurisdictional requirements being wanting.

A

THE ACT OF AUGUST 13, 1894, CHAPTER 280* DOES NOT CONFER JURISDICTION OF THIS CASE UPON THE CIRCUIT COURT.

There is no language in the act which confers jurisdiction upon the Circuit Court of an action on a bond provided for therein. Jurisdiction of a case of this kind cannot be conferred by implication. In the absence of an express provision to that effect, jurisdiction must

*See statute printed in full at page 2.

fail unless it is given by some other statutory provision.

It is a fundamental principle of federal jurisdiction that the Circuit Courts are a creation of Congress under the power given that body by the constitution and upon that body they must depend for all the powers they possess. This is well expressed in an opinion by Livingston, Circuit Judge, in the case of

Livingston vs. *Van Ingen*, Fed. Cas. No. 8420 (1811),

in the Circuit Court for the District of New York (p. 698):

> "It is as certain, that they [the Circuit Courts] are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess. Owing as they do their existence to congress, from them must necessarily flow that portion of the general judicial power which, by the constitution they have a right to divide among the inferior courts that may be established. . . ."

The extent to which this principle was extended is shown in this same case by the answer of the court to the argument that the parties might be without remedy in other courts (p. 700):

> "But if absolutely without remedy elsewhere, it does not follow that this court can help them. A court, constituted like this, is not to reason itself into jurisdiction from considerations of hardship, when a plain and safe rule is prescribed by the supreme court, which is, to examine on all occa-

sions, what powers are committed to it by the laws of the United States."

In the case of

The Bank of the United States v. *Deveaux*, 5 Cranch, 61 (1809),

the question arose of the right of the Bank of the United States to sue in the Circuit Court. The bank was created by act of Congress, and Mr. Chief Justice Marshall, in discussing the question of jurisdiction, used the following language which has an important bearing on the case at bar (p. 86):

> "But the 9th article of the 7th section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or state courts.
>
> "This evinces the opinion of congress that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the circuit courts of the United States."

And as bearing on the question of jurisdiction, the duty of a court in interpreting its own powers is thus well expressed by the same learned judge (p. 87):

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation.

> The constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

In the case of

Harrison v. *Hadley*, Fed. Cas. No. 6137 (1873),

District Judge Caldwell, in the Circuit Court for the Eastern District of Arkansas, used this significant language (p. 651):

> "But the principle is now established that the circuit court of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of congress expressly conferring the jurisdiction. The circuit court is a court of limited jurisdiction and the supreme court has said that 'the fair presumption is that a cause is without its [the circuit court] jurisdiction till the contrary appears.'"

Among other cases are cited:

> *Turner* v. *Bank of North America*, 4 Dall. 8,
> *United States* v. *Hudson*, 7 Cranch, 32,
> *McIntire* v. *Wood*, 7 Cranch, 506,
> *Sheldon* v. *Still*, 8 How. 441.

The further language of this judge in the same case (p. 651) has peculiar force in the case at bar and sustains the principle contended for here:

> "And a right of action given by an act of Congress 'does not imply a right to sue in the courts of the United States unless it is expressed.'—*Bank of United States* v. *Devaux*, 5 Cranch, 61, 86."

In

Re Barry, 42 Fed. R. 113 (1844),

the court says (p. 122):

> "... it is authoritatively established that the circuit courts, at least, cannot exercise jurisdiction as to individual rights, because authorized by the constitution, unless congress has specifically assigned it to them. They possess no jurisdiction other than that which both the constitution and acts of congress concur in conferring upon them."

The court further says (p. 127):

> "This view of the subject disregards the special organization of the United States circuit courts, and the limited purposes they were designed to subserve. They are distributed among the states, to exercise that special jurisdiction bestowed upon the federal government, or shared with it by the state sovereignties, and not to carry with them an inherent power to resort to or employ any other law than that given them by express and written grant. *Chisholm* v. *Georgia*, 2 Dall. 432, 435; *Ex parte Barry*, 2 How. 65."

In

Karrahoo v. *Adams*, Fed. Cas. No. 7614 (1870),

it is said by Dillon, Circuit Judge (p. 135):

> "Again, it is to be remembered that the circuit court is a court of limited jurisdiction, and can exercise it only in cases in which it is expressly conferred by congress."

The principle governing the jurisdiction of the inferior federal courts is thus expressed by Mr. Justice Clifford in the case of the

Sewing Machine Companies, 18 Wall., 553, 557:

"Circuit Courts do not derive their judicial power, immediately, from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' Consequently the jurisdiction of the Circuit Court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing the end. Federal judicial power, beyond all doubt, has its *origin* in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress."

In the case of

Wisconsin v. *Duluth*, Fed. Cas. No. 17, 902 (1872), presided over by Circuit Justice Miller and Circuit Judge Dillon, Mr. Justice Miller treats as rudimentary

the principle that jurisdiction of the Circuit Courts must be expressly conferred, saying:

> "It is a proposition which admits of no further debate, and needs the citation of no authorities at this day, that all courts of the United States, except the supreme court, being the mere creatures of congressional statute, can exercise no jurisdiction but such as is given by those statutes . . ."

Jurisdiction may exist in certain cases by implication, such as for example, the jurisdiction to enforce its own orders and decrees by proceedings for contempt as suggested by Mr. Justice Johnson in the case of

> *The United States* v. *Hudson & Goodwin*, 7 Cranch, 32.

This principle in the abstract may be stated thus: Jurisdiction for the enforcement of any right may be implied, where the enforcement of such right is essential to the integrity and existence of the court. But no case has been found in which jurisdiction of a new right, created by Act of Congress, has been held to be in the Federal Courts by implication, since Congress must have intended such jurisdiction by reason of creating the right.

The application to this case of the principle underlying the above authorities is as follows:

The creation by Congress of a new right does not confer jurisdiction upon the Circuit Courts to enforce such right in the absence of an express provision, conferring jurisdiction. The act of August 13, 1894, chapter 280, contains no such grant of jurisdiction. The Circuit Court for the District of Rhode Island did

not therefore have jurisdiction of this action unless jurisdiction was conferred by some other Act of Congress.

B

THIS IS NOT A CONTROVERSY IN WHICH THE UNITED STATES IS PLAINTIFF WITHIN THE CONTEMPLATION OF THE STATUTE WHICH CONFERS ON THE CIRCUIT COURT JURISDICTION IRRESPECTIVELY OF THE AMOUNT INVOLVED.

Since jurisdiction was not conferred by the act creating the right, we must look elsewhere to determine whether by any other Act of Congress, the Circuit Court has jurisdiction. The Act of Congress (24 Stat. 552, 25 Stat. 433, Comp. Stat. p. 508) which confers jurisdiction generally on the Circuit Courts provides that they shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which controversy the United States is plaintiff. The question then arises, is the United States plaintiff in this action within the contemplation of this act so as to confer jurisdiction upon the Circuit Courts irrespectively of the amount involved?

The act of August 13, 1894, Chapter 280, provides that any person entering into a contract with the United States for the construction of any public building shall be required before commencing such work to execute the usual penal bond with surety (*i. e.* a bond to perform the contract entered into according to its terms) with the additional obligation that such contractor shall promptly make payment to all persons supplying him

materials in the prosecution of the work; a person furnishing materials not paid for shall be furnished with a certified copy of the bond upon which he shall have a right of action," and shall be authorized to bring suit in the name of the United States for his or their use or benefit against said contractor and sureties and to prosecute to final judgment and execution: Provided, *that such action and its prosecution shall involve the United States in no expense.*" [Italics ours.]

This action was brought in the name of the United States for the benefit of and on behalf of James S. Kenyon, as expressed in the declaration (Record p. 3), upon a bond given under the provisions of this act, James S. Kenyon having sold to a government contractor for use upon public works, lumber for which he has never been paid.

This act provides for two distinct rights, viz., the protection of the United States against the nonfulfillment of its contracts and the protection of parties furnishing labor or materials to such contractors. The twofold nature of this obligation is set forth by Thayer, Circuit Judge, in the case of

> *United States to use of Anniston Pipe & Foundry Company* v. *National Surety Company*, 92 Fed. R. 549 (1899).

He says (p. 551):

> "The bond which is provided for by the act was intended to perform a double function,—in the first place to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom

the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, *the government's name being used as obligee in the latter agreement merely as a matter of convenience.*" [Italics ours.]

The same learned judge further observes (p. 550):

"... The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress."

This court, in the case of

Guaranty Co. v. *Pressed Brick Company*, 191 U. S. 416 (1903),

placed the same construction upon this statute.

Mr. Justice Brown says (p. 425):

> "This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his sub-contractors can secure themselves by a mechanic's lien upon the proposed building, the government, solely for the protection of the latter, requires a covenant for the prompt payment of their claims, and the same security that it requires for the performance of the principal contract. In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the sub-contractors. The covenant is made solely for their benefit."

When the twofold character of this obligation is appreciated, the case is simplified. Necessarily, from the circumstances of the case, the obligee for the benefit of the material men must be some person arbitrarily designated. It was natural for the sake of convenience to have the bond made to the United States. It is difficult to conceive a case where a plaintiff would be more formal or modal than in a case of this nature. The United States is not empowered to bring a suit of its own motion against the obligors on such bonds to receive what is due to laborers and material men. Suit may be instituted by the parties beneficially interested without

obtaining the consent of the United States, and no control is exercised by the legal department of the government over such litigation. The act further provides that such action and its prosecution shall involve the United States in no expense. This would seem to lead beyond peradventure to the conclusion that the relation of the United States to this suit is purely formal. In this view of the case, has the Circuit Court jurisdiction because the action is brought in the name of the United States?

From the case of

Browne v. *Strode*, 5 Cranch, 303 (1809),

through a long line of federal cases both in this court and in the lower courts, the rule has been to regard the real rather than the merely nominal parties in determining questions of jurisdiction, whenever substantive or adjective rights of parties would be affected by the discrimination.

The last mentioned case was a suit on an executor's bond, in the name of the justices of peace of Stafford County who were all citizens of Virginia, by an alien to recover a debt against the defendant, also a citizen of Virginia. The court held that the Circuit Court had jurisdiction.

In

McNutt v. *Bland*, 2 How. 9 (1844),

an action had been brought on a sheriff's bond in the name of the governor of Mississippi, the nominal obligee on the bond, for the benefit of certain citizens of New York, against Bland, a sheriff and his surety, citizens of the State of Mississippi. It held that the

Circuit Court had jurisdiction. Mr. Justice Baldwin said (p. 14):

> ". . . We can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond by and in the name of the governor, who is a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution who have a legal right to make the bond available for their indemnity, which right could not be contested in a state court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond."

Mr. Justice Field in the case of

Coal Co. v. *Blatchford*, 11 Wall. 172 (1870),

in distinguishing the difference between a case like the one at bar and a suit by a trustee, makes the following observation:

> "There is no analogy between these cases [citing 5 Cranch, 303, and 2 How. 10] and the case at bar. The nominal plaintiffs in those cases were not trustees and held nothing for the use or benefit of the real parties in interest. They could not as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

Cases to the same effect are

Huff v. *Hutchinson*, 14 How. 586 (1852),
Walden v. *Skinner*, 101 U. S. 577, 589 (1879),
Wade v. *Wortman*, 29 Fed. R. 754 (1887).

Where a state is a nominal party, the Federal Courts in determining jurisdiction, disregard the technical parties to the record, and that not only in cases where the joinder of the state is a subterfuge to avoid the Eleventh Amendment, as in

New Hampshire v. *Louisiana*, 108 U.S. 76 (1883);

but in cases of pleading entirely beyond the control of the parties. Such was the rule in

State of Maryland v. *Baldwin*, 112 U. S. 490 (1884),

which was an action on an administrator's bond, taken in the name of the state for the benefit of such person as should be interested, brought in the state court against citizens of Maryland. It was removed to the Circuit Court on the ground that the real complainants were citizens of New Jersey. The Supreme Court sustained the removal, Mr. Justice Field saying (p.491):

> "The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, *the real controversy is between him and the obligors on the bond.*" [Italics ours].
>
> (p. 492). "So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though

Markley was alone named as plaintiff; and the action was properly removed to that court."

Similar doctrine forms the basis of decision in

State v. *Bowles, etc., Co.*, 80 Fed. R. 161 (1897),
Arkansas v. *Bell*, Fed. Cas. No. 530(1847).

In the former case, which was an action on an attachment bond, Adams, D. J., in upholding the jurisdiction of the Circuit Court, said (p. 161):

> " . . . in such suit the state is at best only a nominal party, without any interest. It does not institute or control the litigation by any of its law officers. On the contrary, the party in interest to whose use the suit is brought has a legal right to make use of the name of the state, not for the benefit or at the peril of the state, but as a matter of personal right, and for his own purposes exclusively. The real controversy in this case is, therefore, between the relator, a citizen of Illinois, and the defendants, citizens of Missouri, and as there is no controversy between the state of Missouri and the defendants, the formal use of the name of the state of Missouri as a supposed necessary party cannot oust this court of jurisdiction."

Where the United States is a nominal party, the rule that the court will disregard that fact and proceed as if the real party in interest were the record party, is equally well established.

In

United States v. *Beebe*, 127 U. S. 338(1888),

the relators claimed that the defendants were the successors in title of a patentee of land who had obtained his grant in fraud of themselves, the real owners. The defendants set up laches, which defense, the relators

contended, was invalid against the government. The defense was held good, however, Mr. Justice Lamar saying (p. 347):

> "We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone."

He further says (p. 346):

> ". . . An inspection of the record shows that the Government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit and has nothing to gain from the relief prayed for and nothing to lose if the relief is denied."

The doctrine was adhered to in the case of

> *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445 (1897).

This was an action brought in the District of Columbia by the administrator of the deceased, for the tortious killing of the intestate by the defendant in Maryland, where the statute requires that such an action should be brought in the name of the state. It was held that there was no material inconsistency in the statutes of Maryland and the District of Columbia, Mr. Justice Brewer remarking (p. 449):

". . . The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District, the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal party plaintiff. . .

"*For purposes of jurisdiction in the Federal courts, regard is had to the real rather than to the nominal party.*" [Italics ours.]

The case of

Howard v. *United States*, 184 U. S. 676 (1902),

has some bearing on the case under consideration. This was an action brought in the name of the United States for the benefit of Stewart, a citizen of Maine, against the sureties upon the bond of Watson, as clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri. The court, speaking through Mr. Justice Harlan, says (p.680):

"The opposite parties here are Stewart, the relator, a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of Watson, who are all citizens of Missouri. The Government is the nominal, while Stewart is the real, plaintiff. His citizenship is to be regarded in an inquiry as to jurisdiction."

In support are cited

Browne v. *Strode*, 5 Cranch, 303,
McNutt v. *Bland*, 2 How. 9,
Maryland v. *Baldwin*, 112 U. S. 490.

The court also considers and affirms the doctrine of

Browne v. *Strode*. The rule to be deduced from the case of *Howard* v. *United States* is that where the United States is the plaintiff for the benefit of an individual in a suit upon a bond wherein it is named as obligee, the general principle in determining jurisdiction dependent on citizenship or character of the parties, set forth above in a long line of authorities applies even though the United States has an incidental interest in such suit, as pronounced as its interest in the bond in the case at bar.

The learned judge before whom the case at bar was tried in the Circuit Court admits the principle that regard is to be had to the real, rather than to the nominal parties for the purposes of jurisdiction in the Federal Courts, but endeavors to bring the present case within an exception to this rule by holding that the United States has an interest in this litigation which makes it more than a formal plaintiff, and for jurisdictional purposes the real plaintiff to this suit. He also bases his decision on the ground that the legal right is in the United States for the benefit of the material men, and such right, among others, is for the material men to avail themselves of the status of the United States as a suitor in the United States courts and to maintain their suits in that forum irrespective of the amount involved (Record p. 13).

The principle to which no exception can be taken is laid down by the court, that the question whether the United States is a party, is not dependent merely upon pecuniary interest (Record p. 12,) citing, In re *Debs*, 158 U. S. 564. The interest of the United States in this phase of the bond is however "quite incidental if not speculative." Its indefinite nature may be under-

stood from the following language of the court:

> "Possibly it was a purpose of the act to benefit the United States by making more certain and prompt the obtaining of labor and materials by contractors. It was possibly the view of Congress that the Government, as a builder of public works, is under such an obligation to those who incorporate their labor and materials therein that the United States may insure their payment by exacting a contract for their benefit . . ." (Record p. 15).

The interest of the United States in an action like the one at bar is derived only from a forced and artificial construction of the act, and it is submitted that the general principle of jurisdiction which would ordinarily apply to the case at bar as laid down by the federal decisions before referred to should not be overruled or held not to apply by reason of such construction.

In the very recent case of

> *Burrell* v. *United States, to use of First National Bank of Everett, Wash.*, 147 Fed. R. 44

decided June 18, 1906, the Circuit Court of Appeals for the Ninth Circuit, speaking through Ross, Cir. J. sustains the position here taken that the United States is not the real plaintiff but simply a formal or modal party—a mere name used for convenience only.

The following cases are cited by the court below in support of its position:

> *United States* v. *Bell Telephone Co.*, 167 U. S. 224 (1897),
> *In re Debs, Petitioner*, 158 U. S. 564 (1895).

We will briefly consider them. In the telephone case, a bill in equity was brought for the cancellation of a patent. The contention was made in a former proceeding in the same case (See 128 U. S. 315) that there was no authority in the United States to maintain such suit. This was overruled. The court in the opinion reported in 128 U. S. 315, says (p. 359):

> "With regard to the jurisdiction of the Circuit Court in which this suit was brought, there does not seem to be any objection made by defendants, if such suit could be brought in any court. Indeed, the language of the act of Congress on that subject does not admit of any such doubt, for it declares 'that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners.' Act of March 3, 1875, 18 Stat. 470.
>
> "In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature, and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and Constitution of the United States. It is, therefore, within the language, both of the Constitution and of the statute conferring jurisdiction on the Circuit Courts. An examination of the specific objections made to the present bill will illustrate and enforce this general view. . . ."

The true criterion, it is submitted, as to whether the

United States is such a party as to give the Circuit Courts jurisdiction on that ground alone, is whether the suit is brought by the United States as the moving party, whether the law department of the government has any charge of the conduct of the litigation, or whether the government is liable for costs or is in any other way affected by the judgment or decree which can be entered.

See in this connection:

> *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1901),
> *Oregon* v. *Hitchcock*, 202 U. S. 60, 69 (1905).

This would seem to be the correct line of distinction. On one side fall the cases brought by the United States to annul patents of land and to cancel patents for inventions (of which latter examples *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, and of the former, *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, are leading cases), where the United States is the plaintiff within the contemplation of the statute conferring jurisdiction on that ground and on the other side fall the cases where third parties use the name of the United States from the necessity of legal technicalities for the enforcement of their rights without the intervention of the government in such action except in name and without its being in any way affected by the judgment or decree therein.

It may be said of *In re Debs, Petitioner*, 158 U. S. 564, that the ground of jurisdiction there depended upon the right and duty of the United States as the sovereign power, in the protection of the interests of its subjects, to take such steps as were necessary to insure the free

and untrammeled transmissions of the mails. The United States in that case appeared by its law officers and conducted the litigation.

The right of the United States to file a bill in equity to annul a patent for an invention is also placed upon the same principle as governed the decision in the Debs case; the court in the Bell Telephone Co. case (128 U. S. 315, 367) says on this point:

> "The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States."

These cases, cited in support of the position of the judge in the Circuit Court, bear close analogy to those cases where it is held that a trustee is the real party in interest, in determining a question of jurisdiction in the Federal Courts dependent on citizenship or character of the parties.

It is not difficult to appreciate the difference in principle between these cases last referred to and the case at bar, where any material man can bring suit without a request therefor to the government and without any intervention of the government's law department.

It remains to consider the case of

United States v. *Beebe*, 127 U. S. 338.

This was a suit to set aside a patent to land which was claimed to have been procured from the government by fraud. The United States was not considered the real

plaintiff and it was held that the defendant could set up the defense of laches which he could not have done if the real plaintiff had been the United States. The question of jurisdiction does not appear to have been raised and the case is not considered from the standpoint of jurisdiction being retained because the United States was plaintiff. Jurisdiction may have been predicated upon citizenship of the real parties in interest, or upon its being an action arising under the laws of the United States, the requisite jurisdictional amount having been present. A reading of the opinion and the citation of authorities therein tend to confirm the conclusion that jurisdiction was not dependent upon the United States being a party. The case of *McNutt* v. *Bland*, 2 How. 9 is cited with approval and the court says that the government is a mere formal complainant, a conduit through which one private person can conduct litigation against another private person. With these authorities before the court and with the statement as to the nature of the government's connection with the case, it is only fair to assume that jurisdiction depended upon other grounds than that the suit was in the name of the United States.

The learned judge in the Circuit Court further attempts to support the jurisdiction for the reason that the United States is the legal plaintiff (Record p. 13). Viewed in its twofold aspect, the bond, so far as given by the contractor to fulfill the terms of his contract with the government runs to the United States legally and beneficially, but in its other aspect it runs to the government "merely as a matter of convenience" (Supra p. 13). The former phase of the bond is not before the court. There is no pretense that the government has

brought the action to recover any damage which it has sustained. The United States is no more the legal plaintiff in this case than was the governor of Mississippi in the case of *McNutt* v. *Bland*, 2 How. 9, or the State of Maryland, in the case of *Maryland* v. *Baldwin*, 112 U. S. 490. It is impossible to predicate jurisdiction merely because in another aspect of the bond, there might be a claim in which the United States would be beneficially interested but which forms no part of the case under consideration. To quote again from the opinion of this court in

Guaranty Co. v. *Pressed Brick Company*, 191 U. S. 416, 425:

> "In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the subcontractors."

And the decision of the court that the material men could not in any way be prejudiced in their right of action by anything done by the United States emphasizes the totally distinct nature of the two covenants and their absolute independence of each other.

The statement by Mr. Justice Brewer in the case of

Stewart v. *B. & O. R. R. Co.*, 168 U. S. 445,

quoted above at page 20, that "for purposes of jurisdiction in the Federal Courts regard is to be had to the real rather than to the nominal party" so unequivocally made, must contain, it is conceived, the principle applicable to the question raised in the case at bar. The general reasoning of the other cases cited from this court is equally pertinent. In this action the government

has no interest nor is it in any sense a trustee to enforce the rights of parties interested in the bond in suit. In the language of Mr. Justice Lamar,

United States v. *Beebe*, 127 U. S. 338, 347

"the Government is a mere formal complainant." It forms "a conduit through which one private person can conduct litigation against another private person" and this litigation is "not for the purpose of asserting any public right or protecting any public interest, title, or property." In the cases cited from this court, jurisdiction was taken in pursuance of the rule, and in spite of the superficial aspect of the record. It would seem, therefore, that *a fortiori* the rule should be applied to sanction a denial of jurisdiction. It is a commonplace of federal practice that the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, were the expression of a policy to restrict the jurisdiction of the Federal Courts. As was said by Mr. Justice Gray, in

> *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449 (1891),
>
> ". . . the general object of this act as appears upon its face and has often been declared by this court, is to contract, not to enlarge the jurisdiction of the Circuit Courts of the United States."

So also, among the many cases where similar assertions occur, may be mentioned:

> *In re Pennsylvania Company*, 137 U. S. 451,454,
> *Fiske* v. *Henarie*, 142 U. S. 459, 467,
> *Martin* v. *B. & O. R. R. Co.*, 151 U. S. 673, 687,
> *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 462.

In view of this expressed policy of the present law, the court will strive rather to further it by applying a well established rule than by distinguishing, on narrowly technical grounds, the present action from those cases where the rule has been applied, to defeat this salutary policy.

II.

The failure of the Federal Courts to take jurisdiction of cases involving less than $2,000 will result in no deprivation of rights or denial of justice.

The argument thus far, that there is no implied jurisdiction in the Circuit Courts of rights created by Congress, if sound, precludes an appeal to the court to sustain the jurisdiction from any supposed necessity of the case by reason of the material man's inability, in those cases involving less than $2000, to enforce his right in any other forum.

The danger of such failure, however, is non-existent. There is no obstacle to prevent a state court from taking jurisdiction of any action which may be brought on these bonds, including, of course, such as may not be cognizable in this court because involving sums less than $2,000. It is true that that part of the statute which provides that material men may sue on a certified copy of the bond would be without effect in a state court. That fact, however, is immaterial. The giving of the bond has created a substantial right, which may be enforced by action as well in a state court as elsewhere. No difficulty arises from the fact that the plaintiff could

not produce the original instrument in court, or make profert of it in his declaration. As early as

Read v. *Brookman*, 3 T. R. 151,

the law of excuse in lieu of profert was laid down. The case was one of replevin, in which, in his avowry, the defendant made title by a deed, "which said deed is lost and destroyed by time and accident." This was held to be a sufficient excuse for not making profert of the deed, Lord Kenyon (p. 156) intimating that an excuse "such as the urgency and justice of the case will warrant" would always be sufficient; and Buller, J., saying (p. 159):

> "The rule laid down by Lord Coke (In *Leyfield's Case*, 10 Co. 92 a.) extends to all cases of *extreme necessity;* those which he mentions are only put as instances; and wherever a similar necessity exists, the same rule holds."

There are many cases in this country where, similarly it was not insisted that the original of a specialty must be produced.

In

Brents v. *Sthal*, 3 Bibb, (Ky.) 482,

it is said (p. 483):

> "The plaintiff then having no right to the possession of the bond, cannot be compelled to produce it; for it is an established rule that a party need not make profert of a bond or other deed, to the possession of which he is not entitled."

In

Duvall v. *Craig*, 2 Wheat. 45,

Story, J. says (p. 61):

"Another exception is, that there is no profert of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception; and, without deciding on others, it is a sufficient answer that the plaintiff is neither a party nor privy to the assignment, nor conusant of the consideration upon which it was made, and therefore is not bound to make a profert of it, or show the consideration upon which it was made."

1 Chitty on Pleading, 14 Amer. Ed., p. 365.

". . . where the plaintiff has no right to the possession of it, or of the counterpart, a profert is unnecessary."

Similar cases are

Adams v. *State*, 6 Ark. (1 Eng.) 497,
Clark v. *Nixon*, 5 Hill (N. Y.) 36, Supreme Court,
Waller's Exec. v. *Ellis*, 2 Munford (Va.) 88, 96,
Butler v. *State*, 5 Gill and J. (Md.) 511,
Wheeler v. *Miller*, 2 Den. (N. Y.) 172, Supreme Court,
Hinsdale v. *Miles*, 5 Conn. 331, *(dictum)*,
French v. *Marstin*, 24 N. H. 440, 452,
Smith v. *Lloyd*, 16 Gratt. (Va.) 295,
Respublica v. *Coates*, 1 Yeates, (Penn.) 2,
Note 1 to *Jevens* v. *Harridge*, 1 Saunders 8 b. [9].

See the instructive opinion by Mr. Justice Bradley in *Claflin* v. *Houseman*, *assignee*, 93 U. S. 130, upon the question of enforcement in State Courts of rights created by Acts of Congress. He says (p. 137):

"If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not

be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Not only is the conclusion that a state court would take jurisdiction, and be fully able to give an adequate remedy on the bond, justified by *a priori* deductions from common-law principles, but as a practical matter such bonds have been put in action in state courts, and no difficulty seems to have been encountered in administering relief. Some of the cases where this has been done are

United States v. *Stratford*, 65 N. Y. Supp. 1051,
United States v. *Fidelity & Deposit Co.*, 83 N. Y. Supp. 752,
United States v. *Hegeman*, 204 Pa. St. 438,
American Surety Co. v. *United States*, 127 Ala. 349,
United States v. *Rundle*, 27 Wash. 7,
United States v. *Jack*, 124 Mich. 210,
American Surety Co. v. *United States*, 77 Ill. App. 106,
United States v. *Henningsen*, 82 Pac. 171, (Wash.),
United States v. *Murdock*, 59 Atl. 60 Me. (1904).

The case of *United States, for the use of Hill* v. *American Surety Company*, 200 U. S. 197 (1906) was brought to this court on writ of error to the Superior Court of the State of Washington, but no question as to the jurisdiction of the State court was raised.

III

The Identical Question of Jurisdiction has already been decided in accordance with the contention of the plaintiff in error in three exactly similar cases.

In the case of

United States v. *Henderlong*, 102 Fed. R. 2 (C. C., D. Ind.),

Judge Baker, in a well-reasoned opinion says (p. 4):

"If this court possesses jurisdiction, it must be found in the first section of the judiciary act of March 3, 1887 . . . The right of action created by the bond in favor of laborers and material men is exclusively vested in them by the statute. They alone are authorized to bring the suit, and to prosecute the same to final judgment and execution. The United States have no interest, either directly or indirectly, in the controversy, nor can they be made liable for costs . . . Is the present suit a controversy in which the United States are plaintiffs or petitioners, within the true meaning of the first section of the present judiciary act? . . . In order that the United States shall become plaintiffs in a case or controversy in a judicial tribunal, they must have some interest in the matter in issue. Where the plaintiff's statement of his case discloses that he has no interest in the controversy, and it affirmatively

> appears that the right to the matter in controversy is vested wholly in some one else, it is difficult to perceive how such person can be said to have a case or controversy . . . The United States are simply a formal or modal party—a mere name used for convenience only. The right of action is vested solely in the Edward Hines Lumber Company . . . The statute merely delegates authority to the laborer or material man to use the name of the United States for his use and benefit in any court having jurisdiction of the subject-matter and the parties. It can hardly be supposed that it was the purpose of the statute to authorize a laborer or material man to prosecute petty claims, involving only a few dollars, in this court, when a more speedy and inexpensive trial can be had in the courts of the state. This is obvious from the fact that congress has manifested a steady purpose to restrict, rather than to enlarge, the jurisdiction of the courts of the United States. No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and material men, unless the citizenship of the parties and the amount involved in the controversy are such as would give jurisdiction as in the case of other suitors."

In

United States v. *Sheridan*, 119 Fed. R., 236 (C. C. W. D Ky.),

Judge Evans, in a carefully considered opinion, adopts the same general reasoning, and reaches the same conclusion as the former case, which he cites with approval.

Since the decision in the case at bar was passed down, the same question has been before the Circuit Court for the Northern District of California, in the case of

United States ex rel. Maxwell v. *Barrett*, 135 Fed. R. 189,

and in an exhaustive opinion, Judge Hunt reached a conclusion in accord with the cases last cited and jurisdiction was denied. The learned Judge says (p. 193):

> " National courts inferior to the Supreme Court are clothed with such powers as Congress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They cannot take jurisdiction by mere implication. They have no jurisdiction by intendment.
>
> " Congress may withhold from the courts of its creation jurisdiction of controversies to which the United States is a nominal party. Unless such power is conferred it is withheld, for statutory courts can have no jurisdiction but such as the statute confers. *Sheldon* vs. *Hill*, 8 How. 441, 12 L. Ed. 1147.
>
> " Circuit Courts have cognizance of any controversy in which the United States is plaintiff. In the case at bar the United States is not, in the proper sense or within the intent of Congress, plaintiff in the controversy presented, for it is without concern or interest therein. Maxwell himself recognized this fact when in the title of the case he designated himself as the plaintiff, when he described himself in the body of the complaint as

plaintiff, and when, in the verification, he swore that he was plaintiff. I think Congress intended to confer a jurisdiction over suits and actions in which are controversies affecting the United States as plaintiff, and in which the government of the United States is more than a mere figurehead. . ."

No reported case has been found in support of the opposite doctrine, except the opinion in the case at bar.

IV.

The act approved February 24, 1905, entitled "An act to amend an act approved August 13, 1894, entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works'" does not in any way affect the decision of the case at bar.

Congress, at the session immediately following the handing down of the opinion in the case at bar, passed an act, which was approved February 24, 1905, amending the act of August 13, 1894. The full text of the latter act, which will be hereafter referred to as the "amended act," is printed in the margin.* The act of

*[Act of Feb. 24, 1905, Ch. 778, 32 Stat. L. 811.]
An Act to amend an Act approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, is hereby amended so as to read as follows:

August 13, 1894, will hereafter be referred to as the "original act." It remains to consider the effect, if any, of the amended act upon the case at bar.

A

The Amended Act is not retroactive.

It suffices to say, under the rule of construction of statutes adopted by this court, that in the absence of any language in the amended act showing an intention

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That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata*

on the part of Congress to have its provisions retroactive, its provisions should be construed prospectively only.

Murray v. *Gibson*, 15 How. 421 (1853),
McEwen v. *Den*, 24 How. 242 (1860),
Harvey v. *Tyler*, 2 Wall. 328, 347 (1864),
Twenty per Cent Cases, 20 Wall. 179, 187 (1873),
Chew Heong v. *United States*, 112 U. S. 536, 559 (1884),
Shreveport v. *Cole*, 129 U. S. 36, 43 (1888).

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among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further* that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may

In

Southwestern Coal Co. v. *McBride*, 185 U. S. 499, 503 (1901),

Mr. Justice White, in delivering the opinion of the court, adopted the following language from the decision of the lower court:

> "The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or neces-

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file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor. 10 Federal Stat. Annotated p. 343.

> sarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation."

In

The United States v. *American Sugar Co.*, 202 U. S. 563, 577 (1906),

Mr. Justice McKenna says:

> "And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied.'"

The same doctrine has been applied in Massachusetts to cases of a remedial character. Thus in

Pierce v. *Cabot*, 159 Mass. 202,

an amendment to a statute relating to the filing of a statement in proceedings to enfore a mechanic's lien was held not to apply to statements filed before the statute went into effect.

In the case of

Shallow v. *Salem*, 136 Mass. 136 (1883),

the notice given to a city of a claim for damages through negligence was held to be insufficient in its description of the place of injury. After the suit had been brought, the law with reference to notice was changed. This amendment, if applicable, would have cured the defect complained of. The amendment was held not to apply. Devens, J., says (page 138):

> "That certain statutes retrospective in their operation may be passed, when of a remedial character, is not controverted; but the general rule applicable to all statutes is that they are to have a prospective operation only, unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions."

In the recent Illinois case of

> *Eddy* v. *Morgan*, 216 Ill. 437; 75 N. E. 174 (1905),

the court says (p. 178):

> "But the rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention to do so; as where the imperfection of the language used and literal construction might defeat the intention expressed."

See also

> *Auditor Gen.* v. *Chandler*, 108 Mich. 569,
> *Bedier* v. *Fuller*, 116 Mich. 126.

Applying the principles set forth in the foregoing authorities to a construction of the amended act, it becomes apparent that it is not susceptible of a retroactive construction so as to apply to cases already pending under the original act.

The changes made by the amended act are radical and sweeping. The amended act was designed to meet the many defects that had been pointed out in the original act by the judicial decisions thereon. These amendments apply to both procedure and substance. The more important of these amendments are as follows:

1. The United States shall first bring suit upon the bond and claimants shall have the right to intervene in such action.

2. Claims due to the United States shall have priority.

3. If the United States does not bring suit within six months from the completion and final settlement of the contract, then the claimant can procure a copy of the bond and sue thereon.

4. The claimant shall have a right of action and shall be authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, and not elsewhere *irrespective of the amount in controversy in such suit* . . . [Italics ours.]

5. Actions on such bonds by claimants must be commenced within one year after the performance and final settlement of the contract.

6. Provision is made for only one action and for intervention in such action by other claimants; and also for payment into court by the surety of the maximum amount of its liability and for relief thereupon from further liability.

The amended act provides for an entirely new system of procedure which could not have been intended to apply to causes of action already pending, and in the clause providing for notice, it expressly states that "in all suits instituted under the provisions of this act, &c.", showing that it was intended to act prospectively only. It also provides that only one suit shall be brought on any one bond. Thirteen other cases are pending in the Circuit Court for the District of Rhode Island, awaiting the

decision of this court in the case at bar. Would it be said that so far as these cases grow out of the same contract, there would be need of consolidation so as to make them conform to the requirements of the amended act? Such a construction of the law would result in a condition of "confusion worse confounded" and it is impossible to contemplate that Congress ever intended it. It also introduces a new feature, viz., priority of any claim due to the United States over the claims of other claimants. The effect of giving a retrospective construction to the amended act might very well be in certain cases to deprive claimants of the vested right to share equally with the United States in the marshaling of assets. See in this connection

United States v. *Bryan*, 9 Cranch, 374,

where a statute giving the United States priority over other claimants was held not to apply to an indebtedness accruing to the United States before the passage of the act.

The amended act is expressed in the future tense. The language is that "hereafter any person, &c." "shall have the right to intervene." "If no suit should be brought by the United States . . . then the person supplying, &c., shall, &c." This form of expression as was said by Mr. Justice McKenna, in

United States v. *American Sugar Co.*, 202 U. S. 563, 578,

"must be given weight."

The provision giving jurisdiction to the Circuit Court, irrespective of the amount involved, is a part of the general scheme of the act, and clearly applies to bonds given after the approval of the act. It is impracticable,

if not impossible to separate it from the other provisions of the act and to hold that as affecting procedure it applies to pending suits.

B

The rules of construction above set forth apply to Amendatory Acts.

The act under consideration is an amendment of a prior act. It provides that the original act "is hereby amended so as to read as follows, &c.," and then the original act is copied with the changes intended to be made. The same rules of construction to determine whether the provisions of a statute are prospective or retrospective apply in the case of an act amended in this form as in other cases of statutory construction. In the case of

Ely v. *Holton*, 15 N. Y. 595,

the Court of Appeals of New York had this question under consideration and in a remarkably strong and lucid opinion, the principles of construction applying to an amendment in the form of "so as to read as follows," is thoroughly considered by Chief Justice Denio. He says (p. 597):

> "The original section and the amended section both commence by conferring upon this court the exclusive jurisdiction to review, upon appeal, 'every actual determination hereafter made at a general term,' &c. It is contended, by the counsel who seek to maintain these appeals, that the amended section should be considered as though it had been

originally enacted several years ago, in the same language which it now contains. If this were so there can be no doubt but that both the appeals should be sustained, as both the determinations appealed from were undeniably made long after the first enactment of that section. But we think this is not the true construction. . .

"The portions of the amended sections, which are merely copied without change, are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken would be made irregular or void by force of the subsequent statute; and confusion of every kind would be introduced. . ."

See also

Sutherland, Statutory Construction, 2d. Ed. § 237.

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule."

See also

Endlich on the Interpretation of Statutes, § 196,

Sedgwick on the Construction of Statutory and Constitutional Law, 2d. Ed. p. 162, (note).

The case of

Ely v. *Holton*, 15 N. Y. 595,

has been cited with approval in a number of cases in New York and also by the leading text writers on the subject of the construction of statutes, and it is submitted that it lays down a reasonable and logical rule.

See

McEwen v. *Den, Lessee*, 24 How. 242, 244,

where the general rule of construction is applied to an amended act without discussion.

C

THE AMENDED ACT IS IN NO SENSE A DECLARATORY ACT.

There is no language in the amended act which would support the contention that it is a declaratory act. But even if it is construed as a declaratory act, it can have no effect on the original act so far as it applies to a case already pending, for the power to interpret and construe statutes rests with the courts and not with the legislature. As was said by Chief Justice Kent in the case of

Dash v. *Van Kleeck*, 7 Johns. 477, 508:

> "It is equally inadmissible to consider the act as declaring how the former statutes were to be construed, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly created statute. But if it be considered as an expo-

> sition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny."

In

Koshkonong v. *Burton*, 104 U. S. 668, 678 (1881), there was an act which purported to construe a former act. Mr. Justice Harlan, in speaking for the court, said:

> "By the first section of the act of 1868, the legislature assumed to declare what was the true intent and meaning of the previous legislation prescribing and limiting the rate of interest. It was said by Chancellor Walworth, in *Salters* v. *Tobias*, (3 Paige, (N. Y.) 338, 344.) . . . That . . . Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it."

The same idea is tersely put by Marshall, C. J., in

Postmaster General v. *Early*, 12 Wheat. 136,148, in this language: "A mistaken opinion of the legislature concerning the law, does not make law."

See also

> Sedgwick on the Construction of Statutory and Constitutional Law, 2d. Ed. p. 214.

In conclusion, we contend that the amended act is

intended to apply only to bonds given after it went into effect. This conclusion is based upon the language of the act. A new system of procedure upon bonds of this class is enacted and the rights of parties under such bonds are materially changed from the original act. The United States is made a preferred claimant as to any claims it may have. The changes, therefore, relate not only to procedure but to matters of substantive right. It is impossible to separate the two and whatever the rule may be as to remedial statutes, the amended act must be held subject to the general rule laid down by this court in construing a statute as to its retrospective or prospective effect. Upon all the considerations, and in view of the language of the act, the amended act is neither retrospective nor declaratory; it applies only to future cases, and the case at bar having arisen and been begun under the original act, the amended act does not in any way affect the decision of this court therein.

V.

The judgment of the Circuit Court of the United States for the District of Rhode Island should be reversed.

Respectfully submitted,

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